The Surety & Fidelity Association of America
100 Years of Service: 1908-2008

American Insurance Association

**Joint Statement in Opposition to Connecticut HB 5113**
**of the**
**American Insurance Association**
**and**
**The Surety & Fidelity Association of America**
**before the**
**House Government Administration and Elections Committee**

**Monday, March 23, 2009**

## Connecticut HB 5113---Waiver of Surety Bonds....*It Hurts Small and Emerging Contractors and Puts Taxpayers and Laborers at Risk*

### Background—Public Works Performance and Payment Bond Requirements

There is good public policy for the universal requirement of surety bonds on public works projects. These bonds guarantee that the project will be completed and that subcontractors, suppliers and laborers on the project get paid. If the surety backs a contractor that defaults on the project, the full amount of the surety bond is available to complete the work and to pay those who performed work on the job. Congress, all states and most municipalities recognize the value of these bonds.

### The Federal Miller Act and State Bonding Requirements on Public Projects

All federal construction projects above $30,000 require payment protection and all above $100,000 require performance bonds and payment bonds. All 50 states and the District of Columbia require payment bonds on state and local public works projects. Connecticut is in the small minority of states that require only a payment bond be in place, rather than payment and performance bonds. This bill would allow even this requirement to be waived.

### The Impact of Waiving Bond Requirements

• **Many Small Subcontractors and Suppliers Are Left with Far Less Protection**--Mechanics liens cannot be asserted against public property in Connecticut. Laborers, subcontractors and suppliers on public projects must rely on the general contractor's payment bond for protection. If this bond is waived, these parties are left with no means to collect for their services and supplies if the contractor is unable or unwilling to pay them. Small, emerging and minority contractors are more likely to start as subcontractors. If no bonds are in place, such subcontractors and suppliers will either have to risk losses from non-payment that they cannot afford, or not work on the public jobs for which they are qualified.

Experience shows that contractors become bankrupt and otherwise default on projects. The number of construction surety claims incurred also reflects the inherent risk of construction. It does not take much imagination to realize that without bonding requirements, a contractor could bid on and be awarded multiple public contracts for which no payment and performance bond was required, with a significant amount of unbonded construction underway at any one time. When a contractor goes bankrupt, it does not fail on one project, but on all. Workers and suppliers on several jobs could be impacted.

In the current economy, construction workers and suppliers need payment protection all the more.

• **Exempting Small Contractors from Bonding Requirements Inhibits Their Growth and Financial Stability**--To grow in the arena of public construction, a contractor needs an established relationship with a surety. Unless these contractors wish to limit all their work to Connecticut where it is now proposed that the bond requirement be subject to waiver, these contractors will need to seek bonding at some point. The later the small contractor is required to enter the bonding world, the harder it will be to gear its business to meet the underwriting standards put in place to ensure only qualified contractors are bonded to complete public projects. These standards also help to ensure the contractor is taking the steps necessary to manage its business correctly and efficiently. In the long run, waiving bonds harms small and emerging contractors and suppliers by substantially increasing their risk of non-payment if they are operating as subcontractors and by raising the difficulty of qualifying for their first bonds.

• **Waiver of Surety Bonds Puts Taxpayers at Greater Risk**--The performance bond ensures that the project is completed with the state and local taxpayers paying only the contract price. If a performance bond is not provided, the taxpayers take on the risk that the contractor will default. If no bonds are in place and a default occurs, the state and local contracting entities will bear the burden of re-letting work and paying any excess completion costs. Those costs ultimately are borne by the taxpayers. The surety provides state contracting entities with an independent, third party evaluation of the qualifications of a contractor to complete a construction project. The surety's assets are on the line if the contractor defaults.

• **State Contracting Entities Will Need to Screen and Qualify More Contractors**--Also important is the qualification process that the surety puts the contractor through to ensure the contractor is qualified to complete the contract. The surety examines the contractor's expertise in the work, character, ability to work in the region where the project is located, current work in progress, and overall management as well as its capital and financial record in paying its obligations. There currently are shortages of state contracting officers. A public entity also does not have the time, or access to the information needed, to make such a detailed evaluation of each bidder. Further, leaving this to the government puts the taxpayers and state and local governments at risk of claims of cronyism and fraud.

• **Waiver of Surety Bonds May Permit Unqualified Contractors to do Work in Connecticut--** Waiving bond requirements will permit contractors to bid on public projects without being required to provide payment and performance bonds. The result of waiving bonds may be that financially unstable contractors, who cannot otherwise obtain bonding and are not pre-qualified by sureties, will be bidding and obtaining public construction projects.

**Consider the Consequences of Unbonded Projects:**

In addition, there are numerous cases in which unpaid subcontractors and suppliers have been left unpaid by the government's failure to obtain statutorily required bonds. See, for example, *U.S. Dept. of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 119 S. Ct. 687, 142 L. Ed.2d 718 (1999).

**Conclusion**

For the reasons listed above, waiving bond requirements is contrary to sound public policy and should be vigorously opposed. Bonding requirements exist to provide vital safeguards for those who work on public projects and the taxpayers who pay for them, and bonds should not be waived.

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## State Bond Thresholds

The state bond thresholds are the amounts above which bonds are required on state construction projects. In most instances, states may require bonds on contracts below the threshold.

| No Threshold | Under $25,000 | $25,000 | $25,000-$50,000 | $50,000 | $75,000 | $100,000 | Other |
|---|---|---|---|---|---|---|---|
| Delaware | Arkansas<br>($20,000) | Hawaii | Kentucky<br>($40,000) | Alabama | Minnesota | Alaska<br>California-6<br>Colorado | Indiana<br>($200,000) |
| Idaho | California-6 | Iowa | South<br>Carolina<br>($50,000) | Arizona<br>Illinois-7 | | Connecticut<br>District of<br>Columbia-11 | Florida-1 |
| Ohio | District of<br>Columbia-<br>11 | Louisiana-8 | Washingt<br>on<br>($35,000) | Michigan | | Georgia | Maine<br>($125,00) |
| Utah | Illinois-7<br>($5,000) | Mississippi | | Montana<br>Oklahoma | | Kansas | North Carolina<br>($300,000) |
| West<br>Virginia | Massachuse<br>tts($5,000)<br>Nebraska-5 | Missouri | | Rhode<br>Island | | | |
| | Wisconsin<br>($10,000) | New<br>Hampshire | | South<br>Dakota | | Maryland<br>Nebraska-5 | |
| | Wyoming<br>($7,500) | New<br>Mexico | | | | Nevada<br>New Jersey-2<br>New York-3 | |
| | | | | | | North Dakota | |
| | | Texas<br>(payment) | Oregon-9 | | | Oregon-9<br>Pennsylvania-<br>10 | |
| | | | | | | | |
| | | | | | | Tennessee | |
| | | | | | | Texas<br>(performance) | |
| | | | | | | Vermont | |
| | | | | | | Virginia | Virginia<br>$250,000 for<br>DOT Projects |
| | | | | | | | |

### Notes

1. Payment and performance bonds may be waived for contracts under $200,000 for counties, cities, political subdivisions and other public entities. The state Department of Management Services may delegate the authority to any state agency to waive bonds for work in excess of $100,000 but less than $200,000. The threshold for DOT projects is $250,000.
2. Bonds may be waived in certain situations if contracts are under $100,000 (public entities other than state agencies) or $200,000 (state agencies).
3. Bonds may be waived by the head of the state agency or commission if the contracts exceed $100,000 or if it exceeds $200,000 for a contract not subject to state requirements for multiple award requirements. (Wicks Act)

4. In contracts under $35,000, the state may retain 50% of the contract amount in lieu of bonds.
5. $100,000 is the performance bond threshold for the construction, repair and improvement of buildings. The payment bond threshold, which is broadly applicable to all public projects, is $15,000 for the state and $10,000 for all other public entities.

6. In California, the threshold for a performance bond is $100,000. The payment bond threshold is $25,000.
7. In Illinois, the bond threshold is $50,000 for state agencies, but $5,000 for all other public entities
8. The threshold is $100,000 for the New Orleans Swage and Water Board
9. Oregon threshold is $100,000 but $50,000 for DOT projects.
10. In Pennsylvania construction projects between $25,000 and $100,000, performance security is required in an amount of 50% of the contract price.
11. In the District of Columbia, bonds are not required in projects under $25,000 and may be waived in projects under $100,000.